No. 02-112

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

VICENTE PINEDA-TORRES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether expert testimony concerning the structure and modus operandi of drug-trafficking organizations is categorically prohibited by the Federal Rules of Evidence in a prosecution of a drug courier for importation of narcotics.

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 287 F.3d 860.

### JURISDICTION

The judgment of the court of appeals was entered on April 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND RULES INVOLVED

Pertinent statutory provisions—21 U.S.C. 841(a), 952(a), and 960(a)—and Federal Rules of Evidence 401, 402, 403, and 702 are set forth in the Appendix. App., *infra*, 28a-32a.

## STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Southern District of California of importation of marijuana in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 37 months imprisonment, to be followed by three years supervised release, and a $200 special assessment. The court of appeals reversed the convictions, App., *infra*, 1a-12a, on the ground that the district court erred in admitting expert testimony concerning the structure of drug trafficking organizations.

1. On August 2, 2000, respondent was driving a car from Mexico into the United States when he was stopped at the San Ysidro Port of Entry near San Diego. During a routine inspection, a U.S. Customs Inspector questioned respondent about his citizenship and the ownership of the vehicle he was driving. When respondent appeared nervous, the Customs Inspector brought a drug sniffing dog to his car, and the dog alerted to the dashboard. A further search of the car revealed 23 packages of marijuana weighing 42.7 pounds hidden behind the glove compartment. See App., *infra*, 3a.

2. On August 16, 2000, respondent was charged with importation of marijuana, in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Both

counts required the government to prove, *inter alia*, that respondent "knowingly or intentionally" engaged in the alleged criminal conduct. 21 U.S.C. 841(a), 960(a)(1).

Before trial, the government provided notice of its intent to introduce expert testimony about the structure of drug trafficking organizations and, in particular, testimony that the person who loads the vehicle with drugs usually is not the person who drives the drugs across the border. Respondent moved to exclude the evidence pursuant to, *inter alia*, Federal Rules of Evidence 401, 403, and 702. Following a hearing, the district court ruled that it would allow the expert testimony. App., *infra*, 4a.

3. A two day trial followed. The government presented the testimony of an Immigration and Naturalization Service (INS) Inspector and two U.S. Customs Service employees concerning the discovery of the drugs in respondent's car, and testimony of a forensic chemist who identified the drugs. In addition, the government called Special Agent Robert Villars of the U.S. Customs Service as an expert in marijuana smuggling. Respondent renewed his objection to the testimony under Rules 401 and 403, but the district court allowed it. Special Agent Villars testified about the "compartmentalization" of the smuggling process, stating that each participant has a separate role, and that the person who loads the vehicle with marijuana is not the person who drives the vehicle across the border. App., *infra*, 4a-5a. He further explained that, given the separation in functions, fingerprinting generally is not a valuable law enforcement tool in identifying drug couriers. *Ibid.*

During respondent's cross examination of the government's witnesses and his closing arguments, counsel

referred both directly and indirectly to the absence of fingerprint or other physical evidence tying respondent to the drugs. See App., *infra*, 16a-17a, 21a-22a, 24a, 26a-27a. On November 8, 2000, the jury returned guilty verdicts on both counts.

4. The court of appeals reversed the convictions and remanded. App., *infra*, 1a-12a. The court held that the admission of Special Agent Villars's testimony required reversal under *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (9th Cir. 2001). As the court explained, "*Vallejo* * * * held that the admission of expert testimony about the structure of drug trafficking organizations violates Federal Rules of Evidence 401 and 403 'whe[n] the defendant is not charged with a conspiracy to import drugs or whe[n] such evidence is not otherwise probative of a matter properly before the court.'" App., *infra*, 5a. The court stated that "[t]he case before us is, in almost all respects, similar to [*Vallejo*]." *Ibid.* In addition, the court relied on its decision in *United States* v. *McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending, No. 02-64 (filed July 12, 2002), in which the court—applying the holding in *Vallejo*—concluded that the admission of "virtually identical expert testimony" by the same expert (Special Agent Villars) "was reversible error." App., *infra*, 7a n.3; see *id.* at 5a-7a.

**ARGUMENT**

This case presents the question whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is categorically prohibited by the Federal Rules of Evidence in the prosecution of a drug courier for importation of narcotics. In holding that the admission of such expert testimony was reversible error in this case, the court of appeals

specifically relied on its decisions in *United States* v. *McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending, No. 02-64 (filed July 12, 2002), and *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (9th Cir. 2001). App., *infra*, 5a-6a. On July 12, 2002, the United States filed a petition for certiorari in *McGowan*, presenting the same question in this case and, in particular, requesting this Court's review of the categorical rule established by the Ninth Circuit in *Vallejo*. In both *McGowan* and in this case, the court of appeals held that the rule of *Vallejo* required invalidation of convictions obtained under 21 U.S.C. 841(a)(1), 952, and 960. Because the question presented in this case is before the Court in *McGowan*, the petition for a writ of certiorari should be held pending the Court's disposition in that case.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *McGowan*, No. 02-64, and then should be disposed of as appropriate in light of the disposition in that case.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

JULY 2002

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 01-50133

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

VICENTE PINEDA-TORRES, DEFENDANT-APPELLANT

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[Filed: Apr. 23, 2002]

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Before: REINHARDT and TALLMAN, Circuit Judges, and DAMRELL,* District Judge

Vicente Pineda-Torres appeals his convictions for importation of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possession of marijuana with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). He argues that the district court abused its discretion when it admitted expert testimony regarding the structure of drug trafficking organizations in a simple, non-conspiracy importation case. Because we hold that the

* The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

district court committed prejudicial error when it admitted this expert testimony, we reverse.[1]

## I. BACKGROUND

Vicente Pineda-Torres had just entered the United States from Mexico by automobile when he was stopped at the primary inspection area at the San Ysidro Port of Entry. Customs Inspector Cruz approached his vehicle and asked him about his citizenship. Pineda-Torres presented his INS documents, which showed that he was a permanent resident of Southern California, and told the inspector that he was returning from visiting a friend in Tijuana. When Inspector Cruz asked him who

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[1] Pineda-Torres also argues that the district court erred by (1) denying his motion for judgment of acquittal on the importation charge because the government failed to prove that he actually crossed the border and "brought the marijuana" into the United States; (2) failing to dismiss the indictment due to the invalid appointment of the United States Attorney in violation of the Appointments and Vacancies Clause of the Constitution of the United States; and (3) failing to dismiss the indictment because 21 U.S.C. §§ 841 and 960 are facially unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

First, we reject Pineda-Torres's claim that there was insufficient evidence to convict him of importation. Customs Inspector Cruz testified that Pineda-Torres had already crossed the border into the United States when he was stopped at the primary inspection area. Second, Pineda-Torres's argument that the United States Attorney's appointment violates the Appointments and Vacancies Clause is precluded by this court's holding in *United States* v. *Gantt*, 194 F.3d 987, 999 (9th Cir. 1999). Third, in light of our recent decisions in *United States* v. *Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc), and *United States* v. *Mendoza-Paz*, No. 00-50029, 2002 WL 531153 (9th Cir. Apr. 10, 2002), we reject Pineda-Torres's claim that 21 U.S.C. §§ 841 and 960 are facially unconstitutional.

owned the vehicle, Pineda-Torres told him a friend named Bob Armando Rodriguez. He then provided the inspector with the registration and correctly recited the registered owner's address.

Inspector Cruz testified at trial that Pineda-Torres appeared nervous, didn't make eye contact, was looking down, and had a scratch in his voice when answering questions. Inspector Cruz's notes from that day, however, do not mention anything about Pineda-Torres not making eye contact, looking down, or having a scratchy voice. The only description that was recorded in Inspector Cruz's notes was a notation that a "Mr. Beltran" appeared nervous. At trial, Inspector Cruz said that this must have been a typographical error because the notation was intended to refer to Pineda-Torres.

Inspector Cruz brought a drug-sniffing dog over to Pineda-Torres's car. After the dog alerted to the front dashboard of the car, Pineda-Torres was escorted to the secondary inspection area where Inspector Tibbetts examined the car. Tibbetts discovered twenty-three packages of marijuana weighing 42.7 pounds hidden from view in secret compartments behind the glove compartment.

Pineda-Torres was charged with importation of marijuana and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 952, 960, and 841. Before trial, the government sent a letter to the defense stating its intention to introduce expert testimony about the structure of drug trafficking organizations including testimony that:

> (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and, accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site.

At the motion in limine hearing, the district judge ruled that he would allow the government's witness to testify about the structure of drug trafficking organizations including the futility of collecting fingerprints because of the compartmentalized nature of drug trafficking organizations. The district judge then told Pineda-Torres to "make [his] plan accordingly." In response to this directive, the defense cross-examined the government's witnesses about their failure to obtain fingerprints from Pineda-Torres's vehicle. One of these witnesses was Special Agent Robert Villars of the United States Customs Service. Special Agent Villars testified as an expert and explained, over defense objection, how drug trafficking organizations are structured. Specifically, Villars testified that, in a drug trafficking organization, all of the functions are compartmentalized with each member having a specific duty. There are those who grow the marijuana, those who store it, those who package it, those who find cars and drivers to smuggle it, and those who sell it. He also testified on direct that fingerprinting drug packaging would not be a valuable tool during drug courier investigations because drug trafficking organizations are

intentionally structured so that drivers do not load the drugs into the car.[2]

The defense presented no evidence. The only element at issue in the trial was whether Pineda-Torres knew that the drugs were in the car. During closing arguments, the government contended that, because Pineda-Torres was part of a "sophisticated drug organization," he must have known that drugs were in the car. The defense responded by arguing that the government did not present evidence sufficient to establish knowledge. Pineda-Torres was convicted on both counts. He was sentenced to 37 months in prison, 3 years supervised release, and a $200 special assessment. He appeals his convictions.

## II. ANALYSIS

The case before us is, in almost all respects, similar to *United States* v. *Vallejo*, 237 F.3d 1008, 1012 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001), in which we held that the admission of expert testimony about the structure of drug trafficking organizations violates Federal Rules of Evidence 401 and 403 "whe[n] the defendant is not charged with a conspiracy to import drugs or whe[n] such evidence is not otherwise probative of a matter properly before the court." *See also United States* v. *Varela-Rivera*, 279 F.3d 1174, 1179 (9th Cir. 2002) (holding that expert testimony concerning the structure of drug trafficking organizations

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[2] Additionally, Special Agent Villars testified that drug trafficking organizations intentionally use a packaging material that makes it difficult to lift clear fingerprints and that any recoverable prints would probably be from someone "south of the border" whose prints are not on file in the United States.

was irrelevant and prejudicial in a border courier case and therefore inadmissible under Federal Rules of Evidence 401 and 403); *United States* v. *McGowan*, 274 F.3d 1251, 1253-55 (9th Cir. 2001) (holding that expert testimony regarding the structure of drug trafficking organizations was inadmissible in a non-conspiracy importation case).

Vallejo, like Pineda-Torres, was driving a car from Mexico into the United States when he was stopped at the border where his car was searched and marijuana packages were found in hidden compartments. *Vallejo*, 237 F.3d at 1013; *see also Varela-Rivera*, 279 F.3d at 1176 (cocaine and methamphetamine found in the vehicle); *McGowan*, 274 F.3d at 1253 (marijuana found in the vehicle). Vallejo, like Pineda-Torres, was charged with importation of marijuana and possession with intent to distribute. *Vallejo*, 237 F.3d at 1012; *see also Varela-Rivera*, 279 F.3d at 1176 (charged with importation of cocaine and methamphetamine and possession with intent to distribute); *McGowan*, 274 F.3d at 1252 (charged with importation of marijuana and possession with intent to distribute). Neither Vallejo, nor Pineda-Torres, was charged with conspiracy and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization. *Vallejo*, 237 F.3d at 1015; *see also Varela-Rivera*, 279 F.3d at 1179 (same); *McGowan*, 274 F.3d at 1254 (same). The only issue in both Vallejo's and Pineda-Torres's trials was whether the defendant knew that there were drugs in the car. *Vallejo*, 237 F.3d at 1017. At both trials, an expert testified about how drug trafficking organizations divide responsibilities among the people who grow, store, smuggle, and sell drugs. *Vallejo*, 237 F.3d at

1013-14; *see also Varela-Rivera*, 279 F.3d at 1176-77 (same); *McGowan*, 274 F.3d at 1253-54 (same).[3]

The implication of the expert testimony and the government's argument to the jury in both cases was plainly that the defendant was a member of an international drug organization and had knowledge that drugs were in the car. *Vallejo*, 237 F.3d at 1017. In Pineda-Torres's case, as in *Vallejo*, the state did not articulate a theory of relevance for the drug structure testimony at the trial. *Id.* at 1015. On appeal in this case, however, the government argued that the purpose of the expert testimony was to show that Pineda-Torres knew that drugs were in the car. We explicitly rejected that reason for offering drug structure evidence in *Vallejo* when we stated that "had that been the [government's] purpose, the district court should properly have excluded it under Rule 403 of the Federal Rules of Evidence." *Vallejo*, 237 F.3d at 1016. To the extent that the *Vallejo* statement may be dictum, we adopt it as a holding here.

In *Vallejo*, we compared the admission of expert testimony about the structure of drug trafficking organizations to the improper use of drug courier profiles and held that the district court abused its discretion when it admitted expert testimony about the structure and operation of drug trafficking organizations in a simple border bust case. *Id.* at 1017. Moreover, because the testimony "unfairly imputed specific knowledge to Vallejo and knowledge was the central question

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[3] Special Agent Robert Villars provided virtually identical expert testimony in both McGowan and Pineda-Torres's trials. *McGowan*, 274 F.3d at 1253. We held that admission of Special Agent Villars's testimony was reversible error in *McGowan*. *Id.*

before the jury," we concluded that the error was prejudicial and required reversal. *Id.* The same is true here.[4]

Our decision in *United States* v. *Murillo*, 255 F.3d 1169 (9th Cir. 2001), does not require a different result. *Murillo* did not involve expert testimony about the structure of drug trafficking organizations. Rather, *Murillo* involved "unknowing drug courier" modus operandi testimony—expert testimony that drug traffickers do not routinely entrust large quantities of drugs to people who are unaware that they are transporting them. *Id.* at 1176. In that case, we held that "unknowing drug courier" testimony was admissible in a drug possession case involving over one million dollars worth of methamphetamine and cocaine to attack the defendant's defense that he was "simply an unknowing courier." *See id.* at 1176-77; *see also United States* v. *Campos*, 217 F.3d 707, 712 (9th Cir. 2000) (holding that unknowing drug courier testimony was admissible in a complex drug importation case); *United States* v. *Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (same).

We distinguished the expert testimony in *Murillo* from that in *Vallejo* by stating that unknowing drug

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[4] The fact that Pineda-Torres did not testify and affirmatively deny knowledge of the drugs that were found in the car is not dispositive. Both parties recognized in their closing arguments to the jury that the only issue in the case was knowledge. Because the improper expert testimony about the structure of drug trafficking organizations was admitted to support the government's contention of knowledge, the testimony was prejudicial regardless of whether Pineda-Torres affirmatively denied knowledge or argued that the government had not proven knowledge.

courier testimony, unlike testimony about the structure of drug trafficking organizations, does not require an expert to "extrapolate about the various roles individuals might play in hypothetical drug trafficking organizations" and does not "imply that [the defendant] participated in a large-scale operation." *Murillo*, 255 F.3d at 1177; *see also Vallejo*, 237 F.3d at 1016, *as amended by* 246 F.3d 1150 (declining to address the admissibility of unknowing drug courier testimony because "[t]his case does not involve the Government's use of 'unknowing courier' testimony"). Instead, an expert presenting "unknowing drug courier" testimony in a complex case looks at the specific facts involved and, in light of his investigative experience, offers his opinion that it would be illogical and contrary to general practice for a drug trafficker to take the very risky step of entrusting his valuable cargo to an unknowing courier.

By contrast, an expert providing testimony about the structure of drug trafficking organizations attributes knowledge to the defendant by attempting to connect him to an international drug conspiracy and thus implies that the defendant "participated in a large-scale operation." *Compare Murillo*, 255 F.3d at 1177. There is no direct evidence associating the defendant with a drug trafficking organization so the expert uses the "blueprint" structure of international drug trafficking organizations as a means of doing so. Because "[c]riminal prosecutions cannot be blueprinted, but must be tailored to the charges and facts of each case in consideration of the individual rights of each defendant," this method of imputing knowledge lacks any probative value and is impermissible. *Vallejo*, 237 F.3d at 1017.

We also reject the government's contention that in this case defense counsel "opened the door" to the drug structure testimony by cross-examining the customs agents about their failure to lift fingerprints from the drug packages and the vehicle.[5] We have held that limited drug structure testimony is admissible in drug importation cases when the defense opens the door by introducing evidence that the government did not attempt to lift fingerprints. *See, e.g.*, *United States* v. *Alatorre*, 222 F.3d 1098, 1100 n.3 (9th Cir. 2000). In this case, however, it was not Pineda-Torres who first introduced the fingerprint evidence issue. Rather, the government notified the defense that it intended to have Special Agent Villars testify that fingerprinting would not be helpful in drug importation cases because of the compartmentalized structure of drug trafficking organizations. When, at an in limine hearing, Pineda-Torres objected to the proposed testimony because it impermissibly implied that he was connected to a drug trafficking organization, the district judge ruled that the government's evidence would be admitted and instructed Pineda-Torres to "plan accordingly." It was in accordance with this instruction that the defense subsequently questioned the government customs agents on cross examination about the lack of fingerprint evidence. Indeed, Pineda-Torres did precisely what the district judge told him to do and made his trial plans knowing that the government would adduce expert testimony as to the futility of obtaining fingerprint evidence in light of the structure and method of opera-

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[5] That is what occurred in *Murillo*, a case in which the defense engaged a fingerprint expert and initiated the inquiry at trial regarding the lack of fingerprints on the drug packages. *Murillo*, 255 F.3d at 1177.

tions of drug trafficking organizations. Under these circumstances, we cannot conclude that it was the defendant who "opened the door."

Because knowledge was the only element at issue in Pineda-Torres's case and because the admission of expert testimony about the structure of drug trafficking organizations "portrayed [Pineda-Torres] as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in his car because of his role in that organization," *Vallejo*, 237 F.3d at 1017, the error was prejudicial and requires reversal. If anything, the expert testimony in Pineda-Torres's case was even more prejudicial than the testimony in *Vallejo*. In the present case, there was no evidence that Pineda-Torres admitted knowledge that there were drugs in the car, whereas, in *Vallejo*, the customs agent testified that the defendant stated that his friend had refused to drive the vehicle because it had drugs in it. *Vallejo*, 237 F.3d at 1013. Here, aside from the presence of the marijuana in the car and the minimally probative testimony regarding Pineda-Torres's apparent nervousness offered by a border agent whose notes contain significant omissions and a name other than the defendant's, the improper expert testimony imputing knowledge to Pineda-Torres by virtue of his implied connection to an international drug trafficking organization was the only evidence presented to establish that Pineda-Torres knew that drugs were in the car.

## III. CONCLUSION

Because we hold that the district court committed prejudicial error when it admitted expert testimony about the structure of drug trafficking organizations,

we reverse Pineda-Torres's convictions and remand his case for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

VICENTE PINEDA-TORRES, DEFENDANT

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MOTION IN LIMINE HEARING

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TRANSCRIPT

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Nov. 6, 2000

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Before: WILLIAM B. ENRIGHT, District Judge

* * * * *

MR. WINTER: Your Honor, the third in limine I filed was to exclude expert testimony. I have received notice of expert testimony in this case. It was—

THE COURT: I have in mind. I have seen the government's trial brief, and I see their offer of proof is contained in the trial brief.

MR. WINTER: That is the notice that I received, your honor. I just like to voice an objection for the

record to 702, 401, and 403. Specific to the 401 and 403 objection would be that the jury would infer because that's the government's expert is speaking of drug cartels and organizations that the inference is that Mr. Pineda is working for a drug cartel or organization when I believe that there is no evidence of that.

THE COURT: Sir?

MR. SAHAM: Your Honor, two things. There was an additional much more detailed disclosure made to Mr. Winter via a letter, a two-page letter enclosing certain attachments which was sent out on October 26, 2000. Additionally, with respect to the Special Agent, the government would seek to have testimony in two areas.

First, the value of marijuana; and secondly, with respect to the drug organization, a down-scaled version of that with respect to the compartmentalization within the drug smuggling organization.

THE COURT: Your case supporting the latter is what?

MR. SAHAM: Your Honor, we did not file a brief, but I think the *Cordoba* case that allows testimony on that issue. I am sorry, Your Honor.

THE COURT: Unless there is something else, it would be my view based upon the offering of the government's trial brief that the evidence they seek to elicit would be appropriate. I think the case law supports it.

You should make your plan accordingly—that that would be limited to the matter set out in the trial brief that would be before the trier of fact.

MR. WINTER: Your Honor, could I have one point to that. The *Cordoba* case deals with a large conspiracy case. This case is a small marijuana case for this district. It is 19.4 kilograms of marijuana. I just like to point out that difference.

THE COURT: Your position is noted on the record.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

VICENTE PINEDA-TORRES, DEFENDANT

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TRIAL TRANSCRIPT

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Nov. 7, 2000

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Before: WILLIAM B. ENRIGHT, District Judge, and a Jury

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CROSS-EXAMINATION

[of Special Agent Steven Tibbetts]

BY MR. WILSON:

Q. You wore gloves when you took the marijuana out of the vehicle?

A. I believe so, yes.

Q. Are you in charge of checking fingerprints on the marijuana?

A. No.

Q. Do you know who is?

A. No, I don't. Normally the investigators are. I really don't know much about that.

Q. You brought some bulk marijuana in front of you right there. Do you know if that has been checked for fingerprints?

A. No, I don't.

Q. When you were in the secondary inspection area, when did the fingerprint person come in?

A. I don't know exactly what time it was or how long after we removed the marijuana.

Q. Did you see a fingerprint person?

A. No.

Q. Do you know if fingerprints were taken in this case?

A. I don't know.

Q. But that's something that's done?

A. I don't know, sir.

Q. You have seen it done?

A. No.

Q. Have you heard of it done?

A. No.

MR. WINTER: Thank you, Your Honor. No further questions.

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DIRECT EXAMINATION

[of Special Agent Robert Villars]

* * * * *

MR. SAHAM: The United States offers Senior Special Agent Robert Villars as an expert in narcotics smuggling and the value of marijuana.

MR. WINTER: Your Honor, I'd like to continue my objection under rule 401, 403.

THE COURT: I'll note your objection; I overrule it. You may cross-examine in this area.

You may proceed. Go ahead.

BY MR. SAHAM:

Q. Agent Villars, in your investigations of reactive cases such as this one, have you found fingerprinting the drug packaging to be a valuable tool in your investigations?

A. No, sir.

Q. Why not?

A. Several reasons. First of all, the material that is used to package the drugs is not conducive to pull prints off of. It also depends how it's hidden. If it is within the gas tank, the gas would be—being a solvent —would take the oil from the fingerprints. It would destroy that.

And also the fingerprints—if you were indeed to find a set of recognizable prints, you would most likely not be able to identify the fingerprints because it's from somebody south of the border of which we have no records of in the United States.

Q. Based on your experience and investigations, is the driver of the vehicle generally the person responsible for loading the narcotics into the vehicle?

A. No, sir.

Q. Why not?

A. It is very come [*sic*] compartmentalized. It's sectioned off for several reasons, one being security. They don't want to give away who they are. Also it is very specialized in that everybody has a specific duty within the organization.

Q. Are those sophisticated enterprises?

A. Yes, sir, they are.

Q. You were talking about compartmentalization and different functions. Could you describe to the jury what those functions are?

A. Basically what it takes to get the product coming north from the person who plants the seed in the ground, grows it and harvest it to pack it into the big 18-wheelers other boars or airplanes that bring it up to the border.

MR. WINTER: Objection; 403.

THE COURT: I note your objection. I will overrule it. The answer may stand. You may inquire.

THE WITNESS: Then you have the people who warehouse it at the border who store it, again the people who break it down into smaller packages, people who shape the packages for the vehicle, the type of conveyance they are using, people who procure the vehicles, who hire the drivers, who rent the houses on this side of the border, the stash houses, to secure their product one [*sic*] they get here. Everybody has a specific task.

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CROSS-EXAMINATION

[of Special Agent Robert Villars]

BY MR. WINTER:

Q. Agent Villars, are you working actively on this case?

A. No, sir.

Q. Have you had any contact with Mr. Saham or the case agent Ms. Ayers, in this case?

A. Yes, I have.

Q. That's to come to testify in an expert capacity?

A. Yes, sir.

Q. You didn't do any of the investigation on this case?

A. No, sir.

Q. You weren't involved in the seizure of Mr. Pineda at the port of entry?

A. I never met him.

Q. Now, you started talking about—you talked at one point about fingerprints and you stated it's hard to get fingerprints of a gas tank. That's because of the gas?

A. Yes, if the packages are concealed with gas, the gas being a solvent, it would be difficult to get fingerprints.

Q. Because the gas is wet and also—

A. It is a solvent. It takes away oil. That's what fingerprints are is oil.

Q. Would it have been fruitless to try to take fingerprints?

A. I don't know whether those was—in this case.

Q. You can take fingerprints off plastic, right?

A. Yes, but the type of plastic it is a cellophane and is all wrinkled. I am no fingerprint expert, however. It is difficult. We have done some submissions—

Q. You can take fingerprints off of—

THE COURT: Let him finish the answer.

THE WITNESS: The wrapping that's so wrinkled that you don't get a whole print.

BY MR. WINTER:

Q. Some cellophane you can take fingerprints off?

A. I don't know. I have never met a person—I don't know of anybody that's ever done that taken fingerprints off cellophane.

Q. That's cellophane?

A. Yes, it's packaged and taped and I don't even know how this was packaged.

Q. What about hard plastic? Could you get fingerprints off that?

A. Yes, you could?

Q. And glass?

A. Yes.

Q. And metal?

A. Yes.

* * * * *

REDIRECT EXAMINATION

[of Special Agent Robert Villars]

BY MR. SAHAM:

Q. Agent Villars, based upon your prior investigation and experience, is the driver typically the person to load the marijuana in the vehicle in a smuggling operation such as what we have here?

A. No.

Q. And why isn't the driver responsible?

A. We have security. They don't want the driver to know anybody with the organization is hired to do one specific task. He is hired to do the task.

Q. You wouldn't expect to find the driver's prints anywhere—strike that.

You wouldn't expect the driver's print on the packaging?

A. No, sir, you wouldn't.

Q. Or necessarily in the interior area of the vehicle?

A. They might be in the interior of the vehicle.

Q. I think I asked that badly. I mean the interior where the marijuana is?

A. No. The driver is not allowed access to where they load the vehicles or to see the stash.

Q. Certainly, we would expect to find the driver's prints on the vehicle?

A. Yes, on doors of the vehicle.

Q. And gear shift?

A. Right.

Q. In your opinion would there be any sort of advantage to the investigation to lift the driver's prints from the steering wheel?

A. No, because we don't know who the driver is.

MR. SAHAM: I have no further questions.

THE COURT: Anything further of the witness?

MR. WINTER: Your Honor, yes.

RECROSS-EXAMINATION

[of Special Agent Robert Villars]

BY MR. WINTER:

Q. You stated that when you were talking about fingerprints that one of the reasons that fingerprints are sometimes not taken is because the individual is from south of the border?

A. The individual that packaged or loaded the vehicle is somebody south of the border. We never had any contact and no way to keep a record.

Q. Because we don't have records of those types of fingerprints?

A. We don't have records of foreign national's fingerprints.

Q. We do have records of people in the United States?

A. Yes, we have some if they have come in contact with law enforcement before. Yes, we have fingerprints somewhere.

Q. Or the DMV?

A. I believe you have a thumb print when you get your driver's license.

MR. WINTER: No further questions.

THE COURT: Anything further?

MR. SAHAM: Nothing further.

THE COURT: Thank you very much. You may be excused.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

VICENTE PINEDA-TORRES, DEFENDANT

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TRANSCRIPT

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Nov. 7, 2000

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Before: WILLIAM B. ENRIGHT, District Judge, and a Jury

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DEFENDANT'S CLOSING ARGUMENT

[by Mr. Winter]

MR. WINTER: There is no evidence that any fingerprint inquiry was made. We heard from agent, the expert that testified, Agent Villars, where fingerprints can't be taken from. They can't be taken from the gas tank. That just makes plain sense.

We know they can be taken from the dash. We know that they can be taken from the metal inside the compartment, and we know that they could possibly be taken from the drug bags. We know that the finger-

prints could have led to put the marijuana in this case, and that's another thing that the government has not done to prove this case beyond a reasonable doubt.

* * * * *

## APPENDIX C

## STATUTES AND RULES PROVISIONS

1. Section 841(a) of Title 21, U.S.C., provides:

**§ 841. Prohibited acts A**

**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

**(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

**(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 952(a) of Title 21, U.S.C., provides:

**§ 952. Importation of controlled substances**

**(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions**

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) In any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

3. Section 960(a) of Title 21, U.S.C., provides:

> **§ 960. Prohibited acts A**
>
> **(a) Unlawful acts**
>
> Any person who—
>
> **(1)** contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> **(2)** contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or
>
> **(3)** contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,
>
> shall be punished as provided in subsection (b) of this section.

4. Rule 401 of the Federal Rules of Evidence provides:

> **Definition of "Relevant Evidence"**
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

5. Rule 402 of the Federal Rule of Evidence provides:

> **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

6. Rule 403 of the Federal Rule of Evidence provides:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

7. Rule 702 of the Federal Rules of Evidence provides:

> **Testimony by Experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1)

the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.